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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TIMOTHY SCOTT SHERMAN, PETITIONER

v.

STATE OF MARYLAND, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTION PRESENTED

In this criminal case, in which significant fact issues were raised at trial concerning physical aspects of the scene of the crime, a juror made an unauthorized and unsupervised midtrial visit to that location. Three state courts of last resort have held that such a site visit mandates automatic reversal as a matter of federal constitutional law. Many other courts have required the prosecution to rebut a heavy presumption of prejudice.

The question presented is whether the courts below erred by placing the burden on the defendant to show prejudice from the unauthorized site visit and reviewing the trial court's determination only for abuse of discretion.

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No.

TIMOTHY SCOTT SHERMAN, PETITIONER

v.

STATE OF MARYLAND, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Timothy Scott Sherman respectfully petitions for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland in this case.

OPINION BELOW

The opinion of the Court of Special Appeals (App., infra, 1a-23a) is unreported.

JURISDICTION

The judgment of the Court of Special Appeals was entered on May 16, 1989. A petition for a writ of certiorari was denied by the Court of Appeals of Maryland on October 20, 1989 (App., infra, 24a-25a). A petition for reconsideration of the denial of certiorari was denied by the Court of Appeals of Maryland on January 10, 1990 (App., infra, 26a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

Petitioner Timothy Scott Sherman is a young man who had never been in any

trouble until the night, two months after his 18th birthday, when both his parents were murdered in their sleep by shotgun blasts. Although Timmy Sherman and many of the members of his immediate family, including the parents of his deceased mother, have steadfastly maintained Timmy's innocence, the State of Maryland, relying entirely on circumstantial evidence, prosecuted him for both murders and secured a guilty verdict from a jury. Petitioner was sentenced to two consecutive life terms and will, unless his conviction is overturned, spend all of his years from young adulthood well into middle age imprisoned for a terrible crime that there is very substantial reason to believe he did not commit.

Timmy Sherman stands as a convicted murderer even though the evidence at trial was entirely consistent with the

hypothesis of innocence; and even though it is undisputed that a member of the jury, unsatisfied with the evidence he was hearing at trial, chose during the course of the trial, but without disclosing his actions to the court or counsel, to conduct his own unauthorized, unsupervised investigation of the crime by visiting a site whose physical description played prominently in the contentions of the parties at trial. Such a site visit has been held, time and time again, to be a violation of the rights of a criminal defendant under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Nevertheless, after only the most cursory review of the point, and without requiring that the State do anything to rebut the presumption of prejudice that ordinarily accompanies such constitutional violations,

the trial and appellate courts below upheld the first-degree murder convictions and life sentences, saying nothing more than that the site visit was not "of such magnitude as to warrant a new trial." Tr. S64.

The decisions of many other state courts of last resort and federal courts of appeals make it abundantly clear that, if Timmy Sherman's case had arisen in those jurisdictions, his convictions would have been reversed on federal constitutional grounds. In at least three jurisdictions, the juror's unauthorized site visit would have led automatically to a reversal on federal constitutional grounds. In many others, the courts would have placed the burden on the prosecution to demonstrate that there was not a "reasonable possibility" or even "the slightest possibility" of prejudice, a

burden that the State in this case was not asked to meet, did not attempt to meet, was not found to have met, and could not possibly meet. Especially in light of the devastating consequences to a young man's life of the judgment of conviction and sentences in this case, the Court should grant certiorari to resolve the sharply conflicting interpretations of the Constitution that have been adopted by the court below and by other courts.

1. At approximately 1 a.m. on October 12, 1987, Elizabeth Ann Sherman and Stevenson Thomas Sherman were murdered in their bed by shotgun blasts. Eighteen-year-old Timmy Sherman, who was Elizabeth Ann Sherman's natural son and Stevenson Thomas Sherman's adopted son, discovered the bodies and awakened his maternal grandfather and nearby neighbor, William

Gibson, at approximately 1:30 a.m. Gibson described Timmy as "very much out of breath and upset." 4 Tr. 4. Gibson and Timmy returned to the Shermans' house, where Gibson checked the bodies and told Timmy his parents were dead. Timmy began to cry. 4 Tr. 6, 8. Gibson called other family members and the police. 4 Tr. 8, 14, 22-24.

In their investigation on the day of the murder, the police made two discoveries that formed the central features of the State's case against Timmy Sherman. 1/ A shotgun that appears to

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1/ The court below, quite incredibly, described the evidence against petitioner as "overwhelming." App., infra, 4a. Nevertheless, the court cited only three facts -- those discussed in the text and the presence of petitioner's fingerprints on the shotgun -- as constituting this "overwhelming" proof that Timmy Sherman, without motive, murdered his parents in cold blood. The (Cont'd)

have been the murder weapon was found in a pine tree on William Gibson's property. 4 Tr. 54. The State theorized that the location of the weapon pointed toward Timmy Sherman's guilt because he had used that tree as a hiding place in the past (App., infra, 5a), even though the evi-

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fingerprint evidence was not at all indicative of guilt because petitioner had used the shotgun for hunting as recently as the day before the murders (5 Tr. 41-46, 8 Tr. 87-88), and the prints on the gun could date from days or months before the murders (8 Tr. 21). As the FBI fingerprint expert admitted at trial, another person could have used the gun without leaving prints by, for example, wearing gloves. 8 Tr. 23-26. The State also succeeded at trial in admitting other evidence for use against Timmy Sherman, but the court below ruled much of that evidence irrelevant and inadmissible under state law. App., infra, 2a-4a. The remaining prosecution evidence -- for example, evidence that Timmy Sherman, an avid hunter, had recently purchased ammunition not matching that used in the murder (see id. at 19a-20a) -- was of no more than marginal probative value.

dence clearly showed that the tree was a well-known hiding place used by others in the neighborhood (9 Tr. 79-80). In addition, the police discovered beneath the mattress of Timmy Sherman's bed a box of shotgun shells matching those used to commit the crime. 6 Tr. 61-62.

Those two facts were vital to the State's case because virtually all of the other evidence one would normally expect in a murder case was absent. There was no evidence of friction between Timmy Sherman and his parents or other motive for the murders. No witnesses heard shots or saw any activity bearing on the crime. Several people in addition to Timmy had access to the house in which the victims were shot. 3 Tr. 139-140; 5 Tr. 112-113, 118.

Most important, on the night of the shooting, police called to the scene

tested Timmy Sherman's hands for gunpowder residue, and none was found, despite the heavy accumulations of residue at the scene. 4 Tr. 104-105; 6 Tr. 15-22; 7 Tr. 11; 10 Tr. 71. Although a neutron activation test was conducted and analyzed by the FBI, the FBI agent called by the State testified unequivocally that "the amounts of antimony and barium present * * * are insignificant, and therefore, it could not be determined if the person from whom the swabs were taken had discharged a firearm or been in the environment of shotgun primer residue." 7 Tr. 11. Thus, Timmy Sherman, supposedly a double shotgun murderer, showed none of the physical signs one would ordinarily find in the immediate aftermath of the murder. Lacking such evidence, the State asked the jury to resolve the conflicting evidence by placing weight on the discov-

ery of the gun in the pine tree and the shotgun shells beneath the mattress.

In addition, each of the two pieces of circumstantial evidence that were central to the State's case was problematic. There is nothing in the record, beyond the bare location of the box of shells, to establish that it was Timmy Sherman who placed the box beneath his mattress. Immediately after Timmy reported the shots to his grandfather, the house filled with family members and police officers. 4 Tr. 92-98. The murderer easily could have planted the box of shells at any time between the shooting and the discovery of the shells several hours later. And the box of shells was never tested for fingerprints, so the State neither proved that Timmy Sherman ever touched the box nor inquired whether anyone else did.

Because the bare discovery of the shotgun shells was so inconclusive, the gun in the tree became a truly vital part of the State's case. Yet the jury, if it wished to credit that evidence as probative of Timmy Sherman's guilt, had to consider physical aspects of the tree bearing on whether it would have been possible for Timmy Sherman to put the gun there. Undisputed testimony at trial concerning the position of the gun in the pine tree, by Police Corporal Edward Hopkins (one of the State's witnesses), showed that the gun had been pushed into the tree with "force." 6 Tr. 114. In fact, it took two officers working together to get the gun out of the tree. 6 Tr. 118. Hopkins admitted, "With my size and stature, I would have had difficulty putting the gun inside the tree in the condition I found it." 6 Tr. 115.

Hopkins was six feet tall, weighed 210, and worked out regularly. 6 Tr. 116. By contrast, Timmy Sherman weighs about 130 pounds. 6 Tr. 116-117. In addition, there were no signs of pine needles or pine tar on Timmy, as might have been expected if Timmy had been the one who hid the gun in the tree. 6 Tr. 117-118.

Thus, one of the most serious unresolved mysteries in the State's case was how Timmy Sherman, if he was the murderer, could have placed the shotgun in the tree despite his slight build and the absence of any evidence of contact with the tree. The prosecutor found this issue so serious that he spent considerable time on the subject in his redirect examination of Corporal Hopkins. 6 Tr. 141-143. During closing arguments, both sides argued the issue. 12 Tr. 35-36, 58-60, 78, 105.

2. Unbeknownst to the court and the parties, one member of the jury decided that there was a need to obtain more evidence about the tree than the State had chosen, or the defense had been permitted, [2/] to introduce. After he was sworn in as a juror but before the trial concluded, Blaine Miller, accompanied by his wife, "went to the Sherman house and then * * * drove back the streets from the Sherman house, back to the entrance of Gibson Manor in looking for a tree that was so involved in the case." Tr. S16. Miller saw the house and the tree. Tr. S16-S17.

The jury eventually returned a guilty verdict. After the verdict, but

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[2/] The trial court denied a pretrial defense motion to permit a supervised visit by the jury to the scene of the crime. See Tr. M75, S63-S64.

shortly before sentencing, Miller contacted defense counsel (Tr. S19-S20) and disclosed his unauthorized site visit for the first time. Counsel introduced evidence of the visit in support of a motion for a new trial. In the hearing on that motion, the trial court did not permit questioning about why Miller found it necessary to make the visit or what effect it had had on his deliberations. Tr. S17-S19. [3/] In particular, the court refused to permit evidence relating to why Miller found a site visit necessary on top of the numerous photographs of the scene shown at trial. Tr. S36. [4/] In

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3/ The court instead suggested that Miller "discuss [his] thought processes * * * with an attorney, with a friend, with a therapist." Tr. S34.

4/ Partly as a result of that exclusionary ruling, the record is less than crystal clear as to the timing (Cont'd)

response to the State's cross-examination questions, however, Miller made it clear that he felt he needed more information about the tree than was available from a videotape and photographs that were introduced at trial: "the tree had been in question, and that's one of the reasons why I went there" (Tr. S26); "the reason why I went there was so I could see the tree that was so much in question" (ibid.).

3. Defense counsel argued to the trial court that the site visit by juror Miller violated Timmy Sherman's Sixth

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of Miller's visit to the scene of the crime. Miller testified twice that it occurred two or three days into the trial (Tr. S16, S25). He also testified unequivocally that it occurred after a videotape of the Sherman house had been shown at trial (Tr. S25). He testified that the visit occurred after some photographs had been introduced at trial, but he was unsure about others (Tr. S26).

Amendment rights and justified a new trial. Tr. S58. The court disagreed. Its entire ruling was as follows (Tr. S63-S64):

> As to the matter of Mr. Miller going to the scene, the Defendant had requested a view of the property. My recall of it, I think the record will reflect, what was, in fact, said, was that I believe that it could be dealt with adequately without a view and that that request could be renewed after we had the evidence, the photographic evidence in place. I was satisfied with the videotapes, the photographs, including the aerial photographs, and the description of witnesses that the issue of the scene had been completely covered, and that there was no need for a view as to that issue. In suggesting a view, Counsel had -- Counsel's suggestions were not only the exterior, I think at one point that they were emphasizing the size of the rooms, the close proximity of the Defendant's room to his parents' room, and so that the inside of the house was part of what they were seeking a view as well as the exterior. So there's no question that Mr. Miller had violated instructions which were given about not doing his own investigation. However, I'm convinced that I denied the view, not because I felt that any significant information would come about, but I felt it would be a waste

> of time and expense to take the jury out there because I felt the issue was fully covered. So that I think that that activity is not of such magnitude as to warrant a new trial or reversible appeal [sic].

Thus, the court denied the defense motion without ever acknowledging that a constitutional violation had occurred or demanding of the State any showing at all to rebut the presumption of prejudice that arises when a juror makes an unauthorized visit to the scene of a crime. The court took no account of the obvious fact that juror Miller felt that there was something significant to be learned by visiting the scene of the crime and seeing the "tree that was so involved in the case." Tr. S16. Instead, the court relied entirely on its own pretrial thought processes in deciding that a site visit somehow did not matter.

On appeal, petitioner argued that his Fourteenth Amendment due process rights as well as his Sixth Amendment rights were violated by juror Miller's site visit. Nevertheless, the Court of Special Appeals, in rejecting petitioner's contention (App., infra, 15a-16a), cited only a civil case in which the Maryland Court of Appeals specifically "reject[ed] the rule which presumes prejudice." Wernsing v. General Motors Corp., 298 Md. 406, 416, 470 A.2d 802, 807 (1984). Having thus placed the burden squarely on petitioner to prove prejudice, rather than on the State to rebut it, the Court of Special Appeals "perceive[d] no abuse of discretion" in the trial court's ruling "that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to

and depicting the crime scene." App., infra, 16a. Thus, at no stage of these proceedings has the State been called on to rebut any presumption of prejudice arising from juror Miller's unauthorzied and unsupervised inspection of the crime scene.

The Court of Special Appeals rejected several other contentions of error and, although it also found several errors, deemed them harmless. It therefore affirmed the convictions. App., infra, 1a-23a. The Court of Appeals denied discretionary review (id. at 24a-25a).

REASONS FOR GRANTING THE PETITION

Timmy Sherman stands convicted of the first-degree murders of his own parents, despite substantial reason to doubt that he in fact committed those of-

fenses. This conviction rests not solely on the evidence that was presented at trial and subjected to cross-examination and other safeguards of the adversary process, but on the basis of that evidence supplemented by the un-cross-examined, unsupervised, unauthorized procurement of information by juror Blaine Miller through his own investigation. Although the courts below did not even acknowledge that Miller's site visit amounted to a deprivation of Timmy Sherman's federal constitutional rights, in fact there can be no doubt that such an escapade violates the defendant's federal rights of confrontation, cross-examination, assistance of counsel, trial by an impartial jury, and due process. "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evi-

dence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-473 (1965) (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)). 5/

5/ The cases finding a violation of those federal constitutional rights by a juror's visit to the scene of the crime are numerous, and the cases stating more generally that the jury's receipt of any extraneous evidence violates those rights are legion. Examples of the former include Gafford v. Warden, 434 F.2d 318 (10th Cir. 1970); Watkins v. State, 237 Ga. 678, 684, 229 S.E.2d 465, 470 (1976); People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 229 N.E.2d 211 (1967); Commonwealth v. Price, 463 Pa. 200, 344 A.2d 493 (1975); Elisovsky v. State, 592 P.2d 1221, 1223 n.3 (Alaska 1979) (Boochever, J.); People v. Holmes, 69 Ill. 2d 507, 372 N.E.2d 656 (1978); State v. Durr, 343 So. 2d 1004, 1007 (La. 1977) (Tate, J., (Cont'd)

The real question in this case is not whether Timmy Sherman's federal constitutional rights were violated -- they indisputably were -- but whether the state courts conformed to federal consti-

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dissenting), vacated sub nom. Durr v. Cook, 589 F.2d 891 (5th Cir. 1979); and People v. Hollingsworth, 22 Mich. App. 545, 177 N.W.2d 687 (1970). See also Goff v. Kinzle, 148 Mont. 61, 66, 417 P.2d 105, 108 (1966) ("a party could hardly be said to have a trial by jury as the term is understood in American jurisprudence, if each juror were permitted to make an independent investigation of the facts").

Examples of the latter include Parker v. Gladden, 385 U.S. 363, 364-365 (1966); Turner v. Louisiana, supra; Patterson v. Colorado, 205 U.S. 454, 462 (1907); Dickson v. Sullivan, 849 F.2d 403, 406 (9th Cir. 1988); United States v. Perkins, 748 F.2d 1519, 1533-1534 (11th Cir. 1984); Owen v. Duckworth, 727 F.2d 643, 645-646 (7th Cir. 1984); Llewellyn v. Stynchcombe, 609 F.2d 194, 195-196 (5th Cir. 1980); Bulger v. McClay, 575 F.2d 407 (2d Cir.), cert. denied, 439 U.S. 915 (1978); Government of the Virgin Islands v. Gereau, 523 F.2d 140, 150-151 (3d Cir. 1975), cert. denied, 424 U.S.

(Cont'd)

tutional standards in holding that the error did not require reversal. The courts below placed the burden on Timmy Sherman to prove prejudice and, with virtually no explanation, ruled that he had not met that burden. Although a few other courts have likewise placed the burden of proving prejudice on the defendant, numerous courts have construed the Constitution quite differently -- and properly so -- to erect a presumption that juror misconduct of this sort is prejudicial. Three courts make that

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917 (1976); United States ex rel. Owen v. McMann, 435 F.2d 813 (2d Cir. 1970) (Friendly, J.), cert. denied, 402 U.S. 906 (1971); State v. Poland, 132 Ariz. 269, 282, 645 P.2d 784, 797 (1982), aff'd on other grounds, 476 U.S. 147 (1986); State v. Sinegal, 393 So. 2d 684, 686-687 (La. 1981); State v. Cox, 322 N.W.2d 555 (Minn. 1982); Barker v. State, 95 Nev. 309, 312-313, 594 P.2d 719, 721 (1979); and State v. Poh, 116 Wis. 2d 510, 525-526, 343 N.W.2d 108, 117 (Wis. 1984).

presumption irrebuttable. Others allow rebuttal, but here the State did nothing to rebut the presumption of prejudice. Thus, the decision below conflicts with numerous other decisions on an important and recurring issue. In light of the frequency with which the issue arises, and the severe consequences to a young man if the conviction is allowed to stand, this Court should grant certiorari.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVERAL STATE COURTS OF LAST RESORT THAT CONSTRUE THE FEDERAL CONSTITUTION TO REQUIRE AUTOMATIC REVERSAL WHEN A JUROR CONDUCTS AN UNSUPERVISED VISIT TO THE SCENE OF THE CRIME

"Several courts have found that unauthorized views of the scene of the crime by even one juror necessarily con-

stitute prejudice sufficient for a new trial." Elisovsky v. State, 592 P.2d 1221, 1223 n.3 (Alaska 1979). The leading case so holding is People v. DeLucia, 20 N.Y.2d 275, 282 N.Y.S.2d 526, 229 N.E.2d 211 (1967).

In DeLucia, the New York Court of Appeals recognized that, under Parker v. Gladden, 385 U.S. 363 (1966), the receipt of extraneous evidence by jurors violates a defendant's rights under the Confrontation Clause of the Sixth Amendment; and the court held that a site visit by a juror is just the kind of receipt of extraneous evidence that implicates such constitutional rights. 20 N.Y.2d at 279, 282 N.Y.S.2d at 530, 229 N.E.2d at 214. The court also held, presumably in light of the self-evident fact that a juror's independent investigation shows that he found additional information necessary to

make up his mind, that such site visits are always prejudicial: "[P]roof of the fact of the unauthorized visit is sufficient to warrant a new trial without proof of how such visit may have influenced individual jurors in their juryroom deliberations. Such a visit, in and of itself, constitutes inherent prejudice to the defendants." Ibid. The New York Court of Appeals has subsequently confirmed the per se nature of the DeLucia rule. In People v. Crimmins, 26 N.Y.2d 319, 310 N.Y.S.2d 300, 258 N.E.2d 708 (1970), the court reiterated and emphasized the above-quoted language from DeLucia. It added: "Although the affidavit [in DeLucia] averred that the jurors had re-enacted the crime, we did not predicate our decision on actual prejudice." 26 N.Y.2d at 323, 310 N.Y.S.2d at 302, 258 N.E.2d at 710. See also Alford

v. Sventek, 53 N.Y.2d 743, 745, 439 N.Y.S.2d 339, 341, 421 N.E.2d 831, 833 (1981) ("we have held that an unauthorized visit to the scene of a crime is inherently prejudicial in a criminal matter").

Quite simply, had Timmy Sherman's trial taken place in New York, his conviction would have been reversed on federal constitutional grounds. That fact alone makes a grant of certiorari appropriate because the court below "has decided a federal question in a way that conflicts with the decision of another state court of last resort." Sup. Ct. R. 10.1(b). 6/

6/ When a state intermediate appellate court has rendered a decision on a federal issue and the State's highest court has denied review, the intermediate court's decision is deemed that of "the highest court of a State in which decision could be

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But there is much more. The Supreme Court of Georgia follows the same approach as New York. In another case involving a visit by jurors to the scene of the crime, the court, citing DeLucia, stated that "the two jurors * * * became, in a real sense, unsworn witnesses against the appellant in violation of the Sixth Amendment." Watkins v. State, 237 Ga. 678, 684, 229 S.E.2d 465, 470 (1976). "This misconduct cannot be ignored and requires a reversal of the judgment based on the jury's verdict in

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had" within the meaning of 28 U.S.C. § 1257(a). See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160 (1954). Presumably, the same rule of construction applies to Rule 10.1(b). Thus, on at least one recent occasion, this Court has granted certiorari to review a decision of the Maryland Court of Special Appeals in order "to resolve a conflict among the state courts." Maryland v. Macon, 472 U.S. 463, 465 (1985).

this case." Id. at 685, 229 S.E.2d at 470-471. In Georgia, as in New York, Timmy Sherman's conviction would have been reversed on federal constitutional grounds.

So too in Pennsylvania. The highest court of that State has deemed it unnecessary "to decide * * * whether every unauthorized view by a juror constitutes reversible error," because prejudice is found whenever "significant issues were raised at trial concerning the physical aspects of the areas visited by the juror." Commonwealth v. Price, 463 Pa. 200, 203-204, 344 A.2d 493, 494 (1975). The Price rule, like the DeLucia/Watkins rule, is explicitly based on the Sixth Amendment. See Commonwealth v. Frazier, 471 Pa. 121, 129, 369 A.2d 1224, 1228 (1977) (Price based on Sixth Amendment right to impartial jury). Because sig-

nificant issues were raised at trial about the physical aspects of the tree visited by juror Miller -- in his own words "the tree that was so much in question" (Tr. S26) -- the Price rule of automatic reversal would have been applied in Pennsylvania. The decision below thus conflicts with Price. See also State v. Durr, 343 So. 2d 1004, 1007 (La. 1977) (Tate, J., dissenting) (discussing DeLucia's automatic reversal rule with approval), vacated sub nom. Durr v. Cook, 589 F.2d 891 (5th Cir. 1979); People v. Hollingsworth, 22 Mich. App. 545, 177 N.W.2d 687 (1970). 7/

7/ Many courts have adopted similar rules as a matter of common law (sometimes in civil as well as criminal cases), obviating the necessity of resort to the Federal Constitution. See, e.g., United States v. Salentine, 27 F. Cas. 927 (E.D. Wis. 1879) (No. 16,213); State v. Baker, 224 Kan. 474, 477, 580 P.2d 1345, (Cont'd)

The decisions in DeLucia, Watkins, and Price have much to recommend them. Because it will generally be true -- as it was here (see p. 16, supra) -- that inquiry into the deliberative process of the jurors will be prohibited under rules analogous to Fed. R. Evid. 606(b), and because jurors will often be unable to offer a reliable explanation isolating the effect that particular information had on the totality of their judgments in any event, it will rarely be knowable what effect an unauthorized site visit has on jury deliberations. But the visit

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1349 (1978); Schmiz v. Illinois Central Gulf Railroad, 546 So. 2d 693, 698 (Miss. 1989); Middleton v. Kansas City Public Service Co., 348 Mo. 107, 152 S.W.2d 154 (1941); Pendleton v. State, 734 P.2d 693 (Nev. 1987); Sanders v. Curry County, 253 Or. 578, 456 P.2d 493 (1969); Schneider v. Moe, 151 Or. 353, 50 P.2d 577 (1935); State v. Ahrens, 25 Utah 2d 222, 225, 479 P.2d 786, 787-788 (1971).

speaks for itself: a juror who goes outside the adversarial process to gather evidence necessarily is looking for something to help him make up his mind. Thus, as the Fifth Circuit stated (in a case involving not a site visit but a different kind of extraneous jury influence), "[i]f the trial judge finds that the jury had before it prejudicial material, the inquiry is complete and the conviction must be reversed." United States v. Renteria, 625 F.2d 1279, 1284 (1980).

This Court should adopt, as a matter of federal constitutional law, the rule that an unauthorized visit by a juror to a crime scene whose physical description is in issue automatically mandates rever-

sal. 8/ Because the decision below conflicts with that rule, certiorari should be granted, and the judgment below should be reversed.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF NUMEROUS FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT THAT CONSTRUE THE FEDERAL CONSTITUTION TO REQUIRE THE PROSECUTION TO OVERCOME A HEAVY PRESUMPTION OF PREJUDICE FROM THE EXPOSURE OF JURORS TO EXTRINSIC EVIDENCE

Even if this Court were unprepared to agree with the highest courts of New York, Georgia, and Pennsylvania that reversal should be automatic in cases of this sort, it is elementary that, once

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8/ There is no need to consider the broader formulation of the rule by the New York and Georgia courts because the narrower Pennsylvania formulation clearly applies to the facts of this case.

constitutional error is shown, the burden shifts to the prosecution to demonstrate the harmlessness of that error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Constitutional error was indisputably shown in this case, yet the burden was placed on the defendant to show prejudice from the error, not on the State to rebut it. That erroneous placement of the burden of proof conflicts not only with the most basic principles of Chapman, but also with scores of decisions specifically requiring the prosecution to meet a heavy burden of rebutting prejudice from extraneous influences on criminal juries. 9/

9/ As a practical matter, the placement of the burden of proof is of vital importance to the outcome of this case. The contested issue -- whether Timmy Sherman could have placed the shotgun in the pine tree where it was found -- was central to

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The vast majority of courts hold that the introduction of extraneous information into jury deliberations creates a presumption of prejudice that the prosecution must overcome. Outside the constitutional context, this Court has held that "any private * * * contact * * * with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial," and "the burden rests heavily upon the Government to establish * * * that such contact with the juror was harmless to the defendant." Remmer

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the jury's determination of guilt or innocence. Even if the existence of other evidence showing the condition of the tree made it possible for the courts to determine that petitioner had not affirmatively demonstrated prejudice, it is inconceivable, in a case as close as this one, that anyone could conclude that the State had disproved prejudice from juror Miller's supplementation of that evidence at trial.

v. United States, 347 U.S. 227, 229 (1954); see also Remmer v. United States, 350 U.S. 377 (1956). And the lower courts have held the presumption of prejudice and heavy burden applicable as a matter of constitutional law to many other cases involving jurors' receipt of extrinsic information. 10/ There is some variation among the lower courts in their

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10/ See, e.g., Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988) (Wallace, J.); United States v. Butler, 822 F.2d 1191, 1195-1196 & n.2 (D.C. Cir. 1987) (Bork, J.); United States v. Williams, 809 F.2d 75, 81 (1st Cir. 1986), cert. denied, 481 U.S. 1030 (1987); United States v. Littlefield, 752 F.2d 1429, 1431-1432 (9th Cir. 1985); United States v. Perkins, 748 F.2d 1519, 1533-1534 (11th Cir. 1984); Owen v. Duckworth, 727 F.2d 643, 646 (7th Cir. 1984); Durr v. Cook, 589 F.2d 891, 894 n.3 (5th Cir. 1979); State v. Sinegal, 393 So. 2d 684, 687 (La. 1981); State v. Cox, 322 N.W.2d 555, 558 (Minn. 1982); State v. Poh, 116 Wis. 2d 510, 525-526, 343 N.W.2d 108, 117 (1984).

description of just how heavy the prosecution's burden of rebuttal is, but both of the leading standards would have mandated reversal in this case.

Some courts, following the lead of Judge Friendly, have held that even "the slightest possibility" of prejudice from an extraneous jury influence requires reversal. As Judge Friendly wrote, "the principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted." United States v. Adams, 385 F.2d 548, 550-551 (2d Cir. 1967). The D.C. Circuit has quoted Judge Friendly and applied his standard. Dallago v. United States, 427 F.2d 546, 560 & n.58 (1969). Likewise, the Tenth Circuit has held that -- even on habeas

corpus review of a state conviction -- the proper standard is that, "if there is the slightest possibility that harm could have resulted from the jury's viewing of unadmitted evidence, then reversal is mandatory." Johnston v. Makowski, 823 F.2d 387, 390 (10th Cir. 1987), cert. denied, 484 U.S. 1026 (1988). See also Wiser v. People, 732 P.2d 1139, 1142 n.5 (Colo. 1987) (noting use of "slightest possibility" standard in these three circuits); State v. Poh, 116 Wis. 2d 510, 527, 343 N.W.2d 108, 117 (1984) (same); Crockett v. Commonwealth, 187 Va. 687, 700-707, 47 S.E.2d 377, 383-387 (1948) (as a matter of common law, State has burden to rebut presumption of prejudice and only "slight" evidence of prejudice is needed to justify new trial). There was, of course, considerably more than "the slightest possibility" that juror

Miller's investigation of the physical state of the tree led to his vote to convict Timmy Sherman. The judgment of conviction therefore would have been reversed if this case had arisen in the D.C., Second, or Tenth Circuit.

Other courts, led by the Ninth Circuit, have held that the proper standard is that "the appellant is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict." United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979) (emphasis added). That standard is deemed equivalent to the Chapman standard and is applied on federal habeas review of state convictions, as well as direct appeal of federal convictions, because the error of introducing extrinsic material into jury deliberations is of federal constitutional dimension.

Gibson v. Clanon, 633 F.2d 851, 853-855 & n.1 (9th Cir. 1980), cert. denied, 450 U.S. 1035 (1981). When state courts have fallen into the error of putting the burden on the defendant to show prejudice (rather than the State to rebut it), and reviewing the no-prejudice determination only for abuse of discretion, the Ninth Circuit has granted a writ of habeas corpus. Marino v. Vasquez, 812 F.2d 499, 504-507 (9th Cir. 1987). That is precisely what happened in this case, and the interpretation of the Federal Constitution below cannot be squared with that prevailing in the Ninth Circuit. 11/

11/ The Ninth Circuit has been unwavering in its vigorous application of the "reasonable possibility" or Chapman standard to review federal and state convictions alike. In addition to the cases already cited, see Dickson v. Sullivan, 849 F.2d 403 (9th Cir. 1988) (Wallace, J.) (granting habeas corpus relief);
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The Ninth Circuit standard prevails in many other courts as well. For example, a panel of the Seventh Circuit, citing the constitutional nature of the rights at stake when a jury considers extrinsic evidence, endorsed the "reasonable possibility" and Chapman standards in United States v. Bruscino, 662 F.2d 450, 457-459 (1981). The en banc court disagreed with the way that the panel applied those standards, but it explicitly agreed with the panel that "reasonable

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United States v. Hernandez-Escarsega, 886 F.2d 1560, 1579-1581 (9th Cir. 1989), petition for cert. pending, No. 89-1413; Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986); United States v. Tebha, 770 F.2d 1454, 1456 (9th Cir. 1985); United States v. Bagnariol, 665 F.2d 877, 883-889 & n.6 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); United States v. Bagley, 641 F.2d 1235, 1240-1241 (9th Cir.), cert. denied, 454 U.S. 942 (1981); see also United States v. Littlefield, 752 F.2d 1429, 1431-1432 (9th Cir. 1985).

possibility" is the correct standard. United States v. Bruscino, 687 F.2d 938, 940 (1982), cert. denied, 459 U.S. 1211 (1983). At least five other circuits, besides the Seventh and Ninth, employ that standard. 12/

Numerous state courts likewise employ the "reasonable possibility" test

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12/ See United States v. Cheyenne, 855 F.2d 566, 568 (8th Cir. 1988); United States v. Greene, 834 F.2d 86, 88-89 (4th Cir. 1987); United States v. Williams, 809 F.2d 75, 81 (1st Cir. 1986), cert. denied, 481 U.S. 1030 (1987); United States v. Perkins, 748 F.2d 1519, 1533-1534 (11th Cir. 1984); United States v. Barnes, 747 F.2d 246, 249-251 (4th Cir. 1984); United States v. Delaney, 732 F.2d 639, 641-642 (8th Cir. 1984); Llewellyn v. Stynchcombe, 609 F.2d 194, 195-196 (5th Cir. 1980); see also, e.g., Stephens v. South Atlantic Canners, Inc., 848 F.2d 484, 485-489 (4th Cir.) (holding that presumption of prejudice and "reasonable possibility" standard apply even in civil cases), cert. denied, 109 S. Ct. 564 (1988); Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986) (same).

and place the burden of rebutting prejudice on the State, as a matter of federal constitutional law. For example, in State v. Sinegal, 393 So. 2d 684 (La. 1981), the Supreme Court of Louisiana reversed a conviction because of extrinsic information that was obtained by a juror. Citing various federal cases, the court noted that "[i]t is essential that all facts considered by the jury are produced in the courtroom with full protection of defendant's rights to confrontation and due process" (id. at 686-687) and that, "[i]f there is a reasonable possibility that extraneous information considered by the jury affected its verdict, a new trial is mandated" (id. at 687). Accord State v. Graham, 422 So. 2d 123, 131-132 (La. 1982), appeal dismissed, 461 U.S. 960 (1983). Likewise, in State v. Poh, 116 Wis. 2d 510, 343

N.W.2d 108 (1984), the Supreme Court of Wisconsin held that it was proper to reverse a conviction because of the "reasonable possibility" that a juror's action in bringing extraneous information to the jury room prejudiced the defendant. The court explicitly noted that this is the proper standard for juror-initiated misconduct as well as outside influence on the jury. Id. at 527 n.16, 343 N.W.2d at 118 n.16. The court also expressly stated that the Chapman standard is proper because of the federal constitutional nature of the rights involved. Id. at 524-529, 343 N.W.2d at 116-118. Other cases, also explicitly grounded in the Federal Constitution, are in accord. 13/

13/ See State v. Poland, 132 Ariz. 269, 282-283, 645 P.2d 784, 797-798 (1982), aff'd on other grounds, 476

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The "reasonable possibility" test was not applied below. Instead, petitioner was required to shoulder the burden of showing actual prejudice. 14/ According to at least seven federal

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U.S. 147 (1986); State v. Glover, 159 Ariz. 291, 293-294, 767 P.2d 12, 15 (1988); In re Stankewitz, 40 Cal. 3d 391, 402-403, 220 Cal. Rptr. 382, 388, 708 P.2d 1260, 1266 (1985); Wiser v. People, 732 P.2d 1139, 1141-1143 (Colo. 1987); State v. Cox, 322 N.W.2d 555, 558 (Minn. 1982); Barker v. State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979); see also State v. Bell, 225 Mont. 83, 92-93, 731 P.2d 336, 341-342 (1987) (as a matter of common law, prejudice from improper site visit is presumed and must be rebutted by State).

14/ Moreover, the trial court pretermitted any realistic opportunity to show prejudice. Counsel were permitted to establish only the bare fact of the site visit (Tr. S17-S19, S36). When it came to making the prejudice determination, the trial court relied entirely on its own perception of what a site visit would add to the evidence at trial -- i.e., that it would be "a waste of time and expense." Tr. S64. Juror Miller obviously had a differ-
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courts of appeals and seven state courts of last resort, that is error of constitutional dimension. Moreover, had the proper standards been applied, Timmy Sherman's conviction would have had to be reversed. The State relied on only two pieces of circumstantial evidence, and the juror's investigation went to the heart of one of those two pieces of evidence. The burden of rebutting the presumption of prejudice should have rested on the State, but the State was not even

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ent perception, but the court -- which was supposed to be determining the impact of the extraneous influence on the jury -- completely ignored that question and instead harkened back to its own reasons for thinking a site visit unnecessary. The fact of the matter is that the trial court made no actual determination of the impact of the site visit on the jury under any standard, let alone under the proper standard that presumes prejudice and requires the prosecution to show otherwise.

called on to show that the juror's independent investigation was not prejudicial. All the State did was point to the fact that some photographs and videotapes of the pine tree were introduced at trial. But the defect in that "showing" is obvious: if juror Miller had been satisfied with that evidence, he would not have undertaken his own investigation. Because juror Miller was not permitted to testify about why he undertook that investigation, the State certainly has not rebutted the presumption that he was dissatisfied with the evidence presented at trial and instead relied on the extrajudicial evidence.

Indeed, the ruling below that the unauthorized site visit was inconsequential, because it related to a subject that was much explored at trial, is perverse. In a case in which little evi-

dence has been admitted at trial bearing on the same subject as the site visit, it is unlikely that the site visit relates to a central issue; on the other hand, the presentation by counsel of a large amount of evidence demonstrates the importance of the issue and thus the heightened need for ensuring that the jury considers only properly admitted evidence. Under the reasoning of the court below, however, the more important the issue that the juror independently investigates, the less likely reversal will be. That cannot be the correct rule.

Notwithstanding the clear position of the vast majority of the federal courts of appeals requiring the prosecution to shoulder a heavy burden of rebutting the presumption of prejudice when the jury has been exposed to extraneous

influences, one federal court of appeals and a number of state courts, in addition to the court below, persist in requiring the defendant to prove prejudice. In United States v. Pennell, 737 F.2d 521, 530-534 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985), for example, a divided panel of the Sixth Circuit held that, following Smith v. Phillips, 455 U.S. 209 (1982), there is no longer a presumption of prejudice from extraneous influences on the jury, and the burden is on the defendant to show prejudice. See also United States v. Griffith, 756 F.2d 1244, 1251-1252 (6th Cir.), cert. denied, 474 U.S. 837 (1985). 15/ Likewise, in a

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15/ Pennell has been explicitly rejected by several other circuits. See United States v. Butler, 822 F.2d 1191, 1195-1196 n.2 (D.C. Cir. 1987) (Bork, J.); United States v. Littlefield, 752 F.2d 1429, 1431-1432 (9th Cir. 1985); see also Abell v. (Cont'd)

recent case specifically involving unauthorized site visits by jurors, the Supreme Court of Nebraska has placed the burden squarely on the defendant to show that he was prejudiced. State v. Woodward, 210 Neb. 740, 316 N.W.2d 759 (1982). Other state courts have done likewise in site visit cases. 16/ Thus, the decision below, while plainly wrong,

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Potomac Insurance Co., 858 F.2d 1104, 1146 & n.50 (5th Cir. 1988), vacated on other grounds sub nom. Fryar v. Abell, 109 S. Ct. 3236 (1989). The Fourth Circuit has been unable to formulate a consistent position. Compare Stockton v. Virginia, 852 F.2d 740, 744 (4th Cir. 1988) (explicitly rejecting Pennell), cert. denied, 109 S. Ct. 1354 (1989), with United States v. Malloy, 758 F.2d 979, 982 & n.6 (4th Cir.) (following Pennell), cert. denied, 474 U.S. 1009 (1985).

16/ See State v. Little, 164 N.W.2d 81 (Iowa 1969); State v. Boggan, 133 N.C. 761, 46 S.E. 111 (1903); State v. Smith, 13 N.C. App. 583, 186 S.E.2d 600, cert. denied, 281 N.C. 157, 187 S.E.2d 586 (1972).

is by no means an isolated and nonrecurring departure from the constitutional standards that require placement of the burden of proof on the prosecution.

Because the conflict between the decision below and many other decisions is stark, and the problem is a recurring one, the Court should grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1990

APPENDIX A

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1491

SEPTEMBER TERM, 1988

TIMOTHY SCOTT SHERMAN

v.

STATE OF MARYLAND

Gilbert, C.J.
Bishop,
Wenner,

JJ.

PER CURIAM

Filed: May 16, 1989

Timothy Scott Sherman was convicted by a jury in the Circuit Court for Harford County (Whitfill, J.) of the shotgun murders of his parents. Sherman was sentenced to two consecutive life sentences.

In his appeal to this Court, Sherman raises a virtual multitude of issues for our review. We shall discuss them in the order posited to us by Sherman, supplying whatever factual predicate is needed to understand the point.

"I. Did the trial court commit reversible error in admitting the prosecution's state of mind evidence?"

Over objection, Cynthia Benjel, a State's witness, testified that Sherman told her four months prior to his parents' deaths that he had seen his parents killed in an automobile accident." Sherman related to Ms. Benjel that he was traveling in the "car behind them, and

had seen their car hit and they were killed...." Another witness, Albert Unkart, told the court that Sherman made a similar remark to him ten days before the homicides. Sherman said that his "folks were killed in an auto accident in front of him." That testimony was presented to demonstrate Sherman's state of mind at the time of the double murder.

Sherman's statements to Unkart and Benjel were not offered for the truth of the matter asserted but were offered as circumstantial evidence of Sherman's state of mind at the time of the slayings. When declarations are simply the circumstantial predicate from which the state of mind may be inferred, they are deemed to be non-hearsay. Santoni v. Moodie, 53 Md. App. 129, 149-50 (1982).

We are convinced that Sherman's conversations with both Unkart and Benjel

were irrelevant. The remarks merely proved that Sherman lied when he stated that his parents were killed in an automobile accident. A rational inference that Sherman was contemplating the violent death of his parents cannot be drawn from the statements. Therefore, the trial judge erred in admitting the evidence.

Nevertheless, in light of the overwhelming evidence against Sherman, the error does not warrant reversal. That evidence against young Sherman included a box, designed to hold five 12-gauge shells yet containing just three, which was found beneath Sherman's bed. The three shells were identical to two shells that were found outside the bedroom of Sherman's parents. Additionally, deputies found a 12-gauge shotgun belonging to Sherman's parents hidden in a nearby

pine tree. Sherman had used that same pine tree to hide items since his childhood. An F.B.I. examination of the weapon disclosed that it had fired the two expended shells found in the hallway of the Sherman's home and that fingerprints on the weapon were those of Timothy Sherman. Sherman's parents were slain by a shotgun blast. Any error in this instance was harmless beyond a reasonable doubt. Dorsey v. State, 276 Md. 638 (1976).

Sherman also avers that the trial judge erred in excluding the testimony of Gail Robinson, appellant's aunt. Ms. Robinson was the sister of Sherman's mother, Ann. She was to testify as to a conversation she had with her sister Ann just several hours before Ann's death. Defense proffered that Ann had said that Sherman was "great" and had "gone to bed

without any problems." The testimony was offered to show Sherman's state of mind at the time of the murders. The court ruled that his testimony was inadmissible hearsay. Judge Whitfill was correct. The proffered evidence did not show Sherman's state of mind but rather that of his mother.

"II. Did the trial court commit reversible error by violating the appellant's constitutional right to due process and a fair trial in limiting the appellant's presentation of evidence to the jury?"

Sherman claims that he should have been allowed to cross-examine his paternal grandfather, Donald, in order to demonstrate the latter's discordant relationship with the murder victims. Judge Whitfill precluded Sherman's counsel from cross-examining the grandfather as to the following matters: 1) Mr. Sherman's claim against his son's estate for a fir-

ing pin assembly of a .22 rifle; 2) Mr. Sherman's refusal to provide his son and daughter-in-law with a wedding rehearsal dinner prior to their marriage; 3) Mr. Sherman's dealings regarding two pieces of family-owned property; 4) when Mr. Sherman last took his son, daughter-in-law, and grandson to dinner and when the murder victims last visited Mr. Sherman's home.

We think the questions to be no more than the proverbial "red herring" dragged across the trail in order to obfuscate the facts.

The right of cross-examination is not unlimited. Waldron v. State, 62 Md. App. 686, 696 (1985). The decision of whether to either allow or disallow questions on cross-examination is normally left to the sound discretion of the trial judge. Waldron at 696; Hopper v. State,

64 Md. App. 97, 1093 (1985). In the instant case Judge Whitfill properly exercised his discretion and excluded the defendant's fishing expedition.

Sherman next asserts that the trial judge erred in refusing to allow him to adduce testimony regarding the bias of Donald Sherman and other family members. The issue is not whether the family was biased against Ann and William [sic] Sherman, the murder victims, but whether Timothy committed the double slayings. The bias is, in the circumstances, totally irrelevant. Of course, we recognize that Sherman sought to direct the jury's attention from himself to his grandfather or other family members. That tactic, however, falls far short of shifting culpability to the grandfather.

"III. Did the trial court commit reversible error in excluding the testimony of Dr. Richard Streete, D.V.M., as both an expert and fact witness concerning the behavior of Rascal, the appellant's and decedents' family pet?"

Sherman maintains that the judge erred in prohibiting Dr. Richard Streete, a veterinarian, from testifying about the post-murder behavior of Rascal, the Sherman family dog.

The decision to admit or preclude expert testimony is vested in the sound discretion of the trial judge, and that decision will not be reversed in the absence of an abuse. Simmons v. State, 313 Md. 33, 43 (1988). Judge Whitfill, as we see it, did not abuse his discretion in finding that the psychological state of the Sherman's dog was irrelevant.

"IV. Did the trial court commit reversible error by violating the appellant's constitutional rights of due process and a fair trial by its failure both

to supply the appellant an unredacted copy of the grand jury testimony of Cpl. Jordan Watts and undisclosed witness statements?"

Sherman asseverates that the trial judge erroneously precluded him from examining all of Sergeant Jordan Watts's grand jury testimony. He also raises a similar complaint about Watts's police report.

As to Watts's police report, Sherman was given seven pages of the 45 page report and advised that the remaining 38 pages consisted of witnesses' statements. Sherman's counsel said that if Watts confirmed that the undisclosed 38 pages pertaining only to witnesses' statements "that's the end of it. I won't go into it." Watts confirmed the matter. Thus, any objection has since been waived by counsel. See Md. Rule 2-517.

With respect to Watts's grand jury testimony, the circuit court redacted those portions of that evidence where Watts was quoting statements of people who had been interviewed. The defense desired to examine the materials not for the purpose of cross-examination but rather to determine what others might have said about the case.

The Court of Appeals in Jones v. State, 297 Md. 7, 14-15 (1983), held that "once a State's witness has testified on direct examination, a defendant is entitled to inspect the grand jury testimony for cross-examination purposes ...." This Court in Ellison v. State, 56 Md. App. 567, 578-79 (1983), said that the right of inspection did not apply when the inspection was for purposes other than cross-examination. Ellison is dispositive of this argument.

"IV. Did the trial court commit reversible error when it violated the constitutional rights of the appellant by its failure to dismiss the indictments?"

Subsequent to the guilty verdict but prior to sentencing, Sherman's attorney was contacted by a member of the grand jury which returned the indictment in the instant case. The juror stated that, out of the panel of sixteen grand jurors, only eleven voted for an indictment. Sherman promptly requested a new trial. The request was denied by Judge Whitfill, who stated:

> "There are no reported votes of the Grand Jury. I found no law that says that it must be recorded, none has been cited to me, and I think that members of the Grand Jury coming forward and raising that after the fact is not sufficient to put the indictment in question. However, the case of State v. Vincent, 91 Md. 718 [1900], says that even if it were invalid, it was waived by having entered a plea to the merits going to trial."

State v. Vincent deals with a challenge to an indictment as a result of an insufficient number of persons constituting a grand jury. The statute under attack in Vincent was merely directory and "designed solely to secure the presence of a number sufficient for twelve to concur in an indictment. Vincent at 719. In Maryland, no man may be indicted by a grand jury consisting of less than twelve of his fellow citizens. In Re Report of Grand Jury, 152 Md. 616, 621 (1927).

The issue in the case at bar is whether twelve jurors voted for the indictment. One grand juror's post-trial allegation that the indictment was returned by less than twelve persons does not warrant a dismissal of the indictment. Sherman failed to meet the heavy

burden of showing that the indictment was handed up by less than the requisite number of grand jurors. Assuming without deciding that we are permitted to do so, without evidence showing clearly what transpired in the grand jury proceeding, we are unwilling to nullify a trial and vitiate an indictment.

Sherman further charges that the trial court should have dismissed the indictment because the prosecution withheld certain exculpatory evidence from the grand jury. The argument is devoid of any merit whatsoever; Sherman tilts at windmills. United States v. Mechanik, 475 U.S. 66, 70 (1986), is dispositive of the case. There, Justice Rehnquist, delivering the opinion of the Court, stated:

> "But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." (Footnote omitted.)

"VI. Did the trial court commit reversible error by violating the appellant's constitutional rights of due process and a fair and impartial trial by not granting the appellant's motion for a new trial due to the consideration by a juror or extrinsic evidence and violation of the instructions of court?"

Sherman argues that the trial court should have granted a new trial because a juror and wife drove to the neighborhood of the murder scene.

When the precise extraneous matter is known but direct evidence as to its effect on the deliberations is not, "a sound balance is struck by a rule which looks to the probability of prejudice

from the fact of extraneous matter in relation to the circumstances of the particular case." Wernsing v. General Motors Corp., 298 Md. 406, 419-20 (1984). When ruling on a motion for new trial, the judge must evaluate the degree of probable prejudice to the defendant in order to discern whether a new trial is justified. Wernsing at 420.

The grant or denial of a motion for new trial rests within the sound discretion of the trial judge. Eades v. State, 75 Md. App. 411, 419-20 (1988). Judge Whitfill found that a new trial was not warranted, particularly in light of the numerous testimonial references, videotapes, and photographs relating to and depicting the crime scene. We perceive no abuse of discretion in that ruling.

Sherman next alleges that there was a violation of the sequestration order

because of the fact that the juror was accompanied by the juror's wife when he visited the crime scene. Sherman asserts that conduct mandates reversal. Sherman's bald averment fails to indicate how the juror's improper action prejudiced the case.

"VII. Did the trial court commit reversible error in not giving a manslaughter instruction to the jury and thereby prohibiting appellant's counsel the benefit of such argument to the jury?"

Sherman complains that the trial court erroneously declined to instruct the jury on the crime on manslaughter.

There is a four-pronged test used to determine whether a particular crime was manslaughter, namely:

"A. Was there an adequate provocation for the killing?

B. Was the killing done in the heat of passion?

C. Did the killing immediately follow the provocation without the reasonable opportunity for the passion to subside or cool?

D. Was there a causal connection between the killing, the provocation, the passion, and the fatal act?"

R. Gilbert and C. Moylan, Maryland Criminal Law Practice and Procedure, § 1.7-5 at 24 (1983).

Each of these questions can be answered in the negative in the case sub judice. Ergo, the trial judge did not err in refusing to instruct the jury concerning manslaughter. The crime of manslaughter was not an issue in the instant matter.

"VIII. Did the trial court commit reversible error in allowing demonstrative evidence to be presented before the jury without the laying of a proper foundation thereby denying the appellant's constitutional right of due process and a fair and impartial trial?"

Sherman challenges the trial court's decision permitting the State to introduce a box of shotgun shells, along with a paper bag that was provided to the buyer at the time the shells were purchased. The State presented the evidence in order to demonstrate to the jury that Sherman had the opportunity to buy shotgun shells just prior to the murders.

> "The rule is well established that physical evidence need not be positively connected with the accused or the crime to be admissible; it is admissible where there is a reasonable probability of its connection with the accused or the crime, the lack of positive identifi-

cation affects only the weight of the evidence."

Doye v. State, 16 Md. App. 511, 519 (1973), cert. denied, 268 Md. 747 (1973). Speaking through Judge Thompson, this Court noted, "It is also relevant to show that the defendant owned or had access to any article with which the crime was or could have been committed." Doye at 518, citing 1 Wharton, Criminal Evidence (12th ed.), § 203 at 408. The paper bag in question was offered into evidence on the basis of the testimony of several witnesses and a number of other items already in evidence. We think the evidence both relevant and admissible.

"IX. Did the trial court commit reversible error by violating the consti-

tutional rights of due process and fair and impartial trial when it conducted ex parte communication with the jury without the knowledge of the appellant?"

Sherman states that the trial judge erred when he engaged in an undisclosed ex parte communication with the jury. A juror described the trial judge's communication as follows:

> "Okay. What he did, come back and we were getting ready to go the motel, and somehow along the line, and I don't know the exact words, we were talking about the motel, and the overnight stay, and it came back as, you know, and he said that, you know, this was his first time, to bear with him, and he would work with us with the overnight stay, and then it was something said to the effect of the cost of or burden, cost of the taxpayers."

It is, of course, the better practice for judges to avoid contact with the jury other than that which the judge's official duty requires. A judge's innocent remark may be misinterpreted by a juror and might disadvantage either party

to the litigation. While we think the judge's comment to the jury ill advised, we, nevertheless, fail to see how the remarks prejudiced Sherman's case one iota. If there be any error, it was harmless beyond a reasonable doubt. Dorsey v. State, 276 Md. 638 (1976).

"X. Did the destruction of evidence by the State violate the appellant's constitutional rights?"

Finally, Sherman contends that the failure by the State to preserve the "bedding" upon which the bodies of the murder victims were found violated the discovery rules and the State's duty to produce exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963).

Addressing a similar contention in DeLuca v. State, ____ Md. App. ____, No. 545, September Term, 1988, filed March 1, 1989, slip op. at 15, Judge Moylan penned: "Even if the State were grie-

vously at fault as alleged, that would do not more than lay the predicate for possible error by the trial judge." As in DeLuca, nowhere in the record are we pointed to any particular ruling by the trial judge that was allegedly erroneous. Sherman's claim is baseless.

JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX B

TIMOTHY SCOTT SHERMAN	)	In the Court of Appeals of Maryland
v.	)	Petition Docket No. 285
STATE OF MARYLAND	)	September Term, 1989
	)	(No. 1491, September Term, 1988 Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers and conditional cross-petition filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date:
October 20, 1989

APPENDIX C

TIMOTHY SCOTT SHERMAN	*	IN THE COURT OF
	*	APPEALS OF
v.		MARYLAND
	*	Petition Docket No. 285
	*	September Term, 1989
STATE OF MARYLAND	*	(No. 1491, September
	*	Term, 1989 Court of
	*	Special Appeals)

* * * * *

O R D E R

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 10th day of January, 1990

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy

Chief Judge